

**Letter of Findings Numbers: 03-20150378.LOF
Withholding Tax
For Tax Years 2012-2013**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

The documentation provided by heating, ventilation, and air conditioning service ("HVAC") contractor showed that a licensed Indiana plumber who was paid a set fee weekly for "on call" services as well as reimbursement for materials was an independent contractor not an employee. Therefore, the Department's proposed assessments for withholding tax were improper.

ISSUE

I. Withholding Tax— Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-2; *Snell v. C.J. Jenkins Enterprises, Inc.*, 881 N.E.2d 1088 (Ind. Ct. App. 2008); [45 IAC 3.1-1-97](#).

Taxpayer protests imposition of withholding tax for the years at issue.

STATEMENT OF FACTS

Taxpayer is an Indiana business providing HVAC services. As the result of an investigation, the Indiana Department of Revenue ("Department") determined Taxpayer had under-remitted on its state and county withholding tax duties for the tax years 2012 and 2013. The Department therefore issued proposed assessments for state and county withholding tax, penalties, and interest for those years. Taxpayer protests these proposed assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Withholding Tax— Imposition.

DISCUSSION

Taxpayer protests the imposition of withholding tax for the tax years 2012-13. The Department based its determination of withholding tax due on several factors. Taxpayer protests that the individual in question was an independent contractor and that it was not responsible for collecting and remitting withholding tax on him. The Department notes the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as required by IC § 6-8.1-5-1(c).

The relevant regulation is [45 IAC 3.1-1-97](#), which states in relevant part:

Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax.

Therefore, an employer is required to withhold adjusted gross and county adjusted gross income tax from payments of wages made to its employees.

In addition, the Department refers to IC § 6-8.1-5-2(f), which states:

If a person files a fraudulent, unsigned, or substantially blank return, or if a person does not file a return, there is no time limit within which the department must issue its proposed assessment.

(Emphasis added).

In this case, Taxpayer did not file withholding tax returns for the years at issue, therefore there is no time limit for the Department to issue proposed assessments for withholding tax for those years, as provided by IC § 6-8.1-5-2(f).

Taxpayer states that there are several factors under the federal Internal Revenue Service's ("IRS") guidelines to consider when determining if an individual is an employee or an independent contractor. The Department notes that the Court of Appeals of Indiana addressed the problem of determining if a person is an employee or an independent contractor in the case *Snell v. C.J. Jenkins Enterprises, Inc.*, 881 N.E.2d 1088 (Ind. Ct. App. 2008). In that case, the plaintiff (Snell) averred he was an employee in order to recover some money, which he believed the defendant (Jenkins) owed him, using Indiana wage statutes. The court determined the plaintiff was an independent contractor. The court explained:

Because the question at issue here is whether Snell was Jenkins's employee or an independent contractor, we too will employ the ten-factor test pursuant to the Supreme Court's direction in *Moberly*. These ten factors are as follows:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant; and
 - (j) whether the principal is or is not in business.
- (*Id.*, at 1091).

The court discussed each factor and determined whether that particular factor weighed towards Snell's status as an employee or an independent contractor. The court also considered how strongly each factor weighed in which direction. Ultimately, the court determined that sufficient factors weighed strongly enough to rule that Snell was an independent contractor.

In the instant case, Taxpayer discusses the IRS factors but provides little documentation in support of its position that the individual was an independent contractor and not an employee. Taxpayer points out that the individual in question is an Indiana licensed plumber (hereinafter the "plumber") and that Taxpayer is an HVAC service provider, which weighs in favor of the Taxpayer as explained in factors: (b), (c), (d), (e), (f) and (h) in *Snell*. After the hearing, Taxpayer provided copies of written agreements between Taxpayer and the plumber. The agreements disclose that Taxpayer agreed with the plumber to provide plumbing services that only a licensed plumber could provide, on an "as needed" basis, during Taxpayer's HVAC installation and renovation jobs. The fact that Taxpayer drafted and signed the agreements weighs in Taxpayer's favor as explained in factors (a) and (i) in *Snell*. Taxpayer further disclosed it paid the plumber a set fee of \$600 weekly and an additional \$800 on a monthly basis to insure the plumber would give the taxpayer priority on call service. The agreements also provided Taxpayer would additionally reimburse the plumber for materials used, tools purchased or rented while working on Taxpayer's jobs. Plumber exercised his own judgment as to what materials and tools were needed for each job; Taxpayer did not provide them to the plumber. The weekly payments and that Taxpayer is a business weigh against Taxpayer as explained in factors: (g) and (j) in *Snell*. Although the paucity of documentation and the regular set payments made by Taxpayer to the plumber factor against Taxpayer's claim. The fact that the

majority of factors in Snell weigh in favor of Taxpayer and that Taxpayer reimbursed plumber after each job was complete tip the balance in favor of Taxpayer. Therefore, Taxpayer has met the burden of proving the proposed assessments wrong.

FINDING

Taxpayer's protest is sustained.

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